No. 77-1539

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of apeals (Pet. App. 13-47) is reported at 557 F.2d 438. The opinion of the district court (Pet. App. 50-52) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48-49) was entered on August 12, 1977. A petition

for rehearing was denied on January 25, 1978 (Pet. App. 55). The petition for a writ of certiorari was filed on April 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 3 of the Limitation of Liability Act of 1851, 46 U.S.C. 183, limits the amount recoverable by the United States in a suit for reimbursement of costs incurred in removing a vessel sunk in navigable waters in violation of Section 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. 409.

2. Whether the United States may proceed *in rem* against a vessel causing a violation of Section 15 of the Rivers and Harbors Act, as well as against the vessel's owner and operators *in personam*, to recover wreck removal expenses.

STATUTES INVOLVED

1. Section 15 of the Rivers and Harbors Act of 1889, 30 Stat. 1152, 33 U.S.C. 409, provides in part:

> It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *. And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark

> it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

2. Section 3 of the Limitation of Liability Act of 1851, 9 Stat. 635, as amended, 46 U.S.C. 183, provides in part:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

STATEMENT

On April 24, 1974, the M/V IDA GREEN, a research vessel owned by petitioner University of Texas Medical Branch at Galveston,[1] collided with a Nor-

[1] The vessel was under charter to petitioner Pallisades Geophysical Institute, Inc., and was being operated by petitioner Freeport Operators, Inc. (Pet. 3).

wegian tanker in the Galveston Bay shipping channel. The Norwegian tanker in turn collided with the A. MACKENZIE, a dredge owned by the United States Army Corps of Engineers. This collision caused the A. MACKENZIE to sink in mid-channel (Pet. App. 16).

Because the wreck posed a danger to shipping in one of the busiest Gulf Coast waterways, the United States took immediate action and removed the wreck at a cost of approximately $3,000,000 (Pet. App. 16). Petitioners filed a complaint in the United States District Court for the Southern District of Texas, seeking a declaratory judgment that, under Section 3 of the Limitation of Liability Act (the "Limitation Act"), their liability for any damages resulting from the collision in the Galveston channel is limited to the value of the M/V IDA GREEN and its contents at the time the collision occurred. Petitioners estimated the value of the vessel and its contents at $240,000 (Pet. App. 17). The United States in turn sought a declaration that the recovery of wreck removal expenses under Section 15 of the Rivers and Harbors Act is not subject to the provisions of the Limitation Act. The district court granted the government's motion.

The court of appeals affirmed in an extensive opinion on which we largely rely. The court noted that, under *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, when a vessel is sunk in navigable waters in violation of Section 15 of the Rivers and Harbors Act, the United States may either (i) seek an injunction to compel the parties whose negligence

caused the vessel to sink to remove the wreck, or (ii) remove the wreck and sue the negligent parties for reimbursement of the removal expenses (Pet. App. 23-25; see *Wyandotte Transportation Co.* v. *United States*, *supra*, 389 U.S. at 203-205). The court of appeals determined that, if the Limitation Act were to limit the government's recovery in a suit for reimbursement of wreck removal expenses, the scheme of remedies provided by the Rivers and Harbors Act would be inadequate to accomplish the purposes of the Act—which are to ensure the prompt removal of obstacles to navigation in the nation's waterways, and to place responsibility for wreck removal on those persons whose negligence has caused the obstruction (Pet. App. 37-38).

The court stated that, if any conflict exists between the remedies afforded under the Rivers and Harbors Act of 1899 and the provisions of the Limitation Act of 1851, the objectives of the more recent legislation must control (*ibid.*). The court indicated, however, that it was doubtful whether there is any inconsistency between the two Acts because the legislative history of the Limitation Act indicates that the Congress did not intend to limit shipowners' liability for wreck removal expenses (*id.* at 43-45).

ARGUMENT

1. The court of appeals correctly decided that the Limitation Act does not apply in a suit by the United States for the recovery of wreck removal expenses. There is no conflict between the decision of the court

of appeals in this case and the decisions of other courts, and there is no reason for review by this Court.

a. Section 15 of the Rivers and Harbors Act provides that "[i]t shall not be lawful * * * to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *." Section 16 of the Act provides criminal penalties for a violation of this provision,[2] and Sections 19 and 20 allow the United States to remove the wreck in specified situations and to sell the vessel and retain the proceeds.[3] In *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, the Court held that these remedies and sanctions are not exclusive. The Court stated that the purpose of the Act—which is to prevent and remove impediments to inland navigation—requires recognition of additional remedies. 389 U.S. at 202-204.

In order to deter negligent conduct and to ensure that the party whose negligence caused the violation of Section 15 "rectif[ies] the wrong done to maritime commerce," 389 U.S. at 204, the United States may

[2] Section 16 of the Rivers and Harbors Act, 33 U.S.C. 411, makes it a crime for any person or corporation to violate Section 15. Each violation may be punished by a fine not exceeding $2,500, or by imprisonment for a period not exceeding 30 days, or by both.

[3] Under Sections 19 and 20 of the Rivers and Harbors Act, 33 U.S.C. 414 and 415, the United States may remove the wreck if it is not removed by its owner within 30 days, or has been abandoned, or must be removed immediately as an interference to navigation.

obtain an injunction ordering the responsible party to remove the wreck from the navigable waterway. *Ibid.* Alternatively, if the government determines that prompt action is required and itself removes the vessel, the United States may sue the responsible negligent parties for the costs incurred in the removal (see *id.* at 205):[4]

> [I]n any case in which the Act provides a right of removal in the United States, the exercise of that right should not relieve negligent parties of the responsibility for removal. Otherwise, the Government would be subject to a financial penalty for the correct performance of its duty to prevent impediments to inland waterways.

The Court did not determine in *Wyandotte* whether the government's right to obtain reimbursement for wreck removal expenses under the Rivers and Harbors Act is subject to the restrictions of the Limitation of Liability Act of 1851. See 389 U.S. at 205-206 n. 17. The Limitation Act provides that a shipowner's liability for damages resulting from the operation of his vessel is limited to the value of his interest in the vessel so long as the damage occurred "without the privity or knowledge of such owner * * *." 46 U.S.C. 183(a). Petitioner contends (Pet. 5-8) that the Limitation Act prohibits recovery of the costs of wreck re-

[4] The action for reimbursement of wreck removal expenses lies against the party whose negligence caused the vessel to sink, whether that party owned the vessel or not. *Wyandotte Transportation Co.* v. *United States, supra*, 389 U.S. at 199 n. 11; see *id.* at 197 n. 6.

moval expenses unless the government establishes that the damages suffered were incurred with the "privity or knowledge" of the owner. The court of appeals properly held, however, that the purposes of the Rivers and Harbors Act that require recognition of a right of action to recover wreck removal expenses also require that the government's right to reimbursement not be limited to sums less than the actual expenses incurred.[5]

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[5] In wreck recovery cases in which the negligent party was also the owner of the sunken vessel, several courts have concluded that the Limitation Act does not apply because the owner of the vessel has a statutory duty to remove the vessel under Section 15 of the Rivers and Harbors Act, and the intentional failure to perform that duty is within the owner's "privity or knowledge." See, *e.g.*, *In re Chinese Maritime Trust, Ltd.*, 361 F. Supp. 1175, 1177 (S.D. N.Y.), affirmed, 478 F.2d 1357 (C.A. 2); *In re Pacific Far East Line, Inc.*, 314 F. Supp. 1339, 1349 (N.D. Cal.). A person whose negligence has caused another's vessel to sink in violation of Section 15, however, also has an enforceable duty to remove the sunken vessel. See *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 204. Failure to perform that duty is as much within that person's "privity or knowledge" as a failure of an owner to remove his own vessel, and on this reasoning the Limitation Act is inapplicable to the government's wreck removal claim.

The court of appeals did not adopt this analysis, however, because the petitioners' liability depends on proof of negligence in the operation of the IDA GREEN (Pet. App. 34-35). But liability for even intentional torts may be said to be contingent on proof; the critical consideration is not whether the petitioners know they will be found liable, but whether they know that their actions or inactions are harming navigation. The refusal to remove a wreck—whether or not the owner of another vessel involved in the collision is legally obligated to do so because of negligence in that vessel's operation—is a conscious decision

Wyandotte establishes that negligent parties may be enjoined to remove a vessel that they have sunk in violation of Section 15 of the Rivers and Harbors Act. When the government seeks and obtains an injunction in such a case, the negligent parties necessarily bear the entire cost and responsibility for removing the wreck. When the government determines that a wreck is immediately threatening to navigation, however, and thus removes the vessel before obtaining an injunction, it is still the policy of the Act that the negligent parties must be responsible for the consequences of their violation. "Having properly chosen to remove such a vessel, the United States should not lose the right to place responsibility for removal upon those who negligently sank the vessel." *Wyandotte Transportation Co.* v. *United States*, *supra*, 389 U.S. at 204.[6] In order to ensure that the negligent party does not subject the United States "to a financial penalty for the correct performance of its duty," 389

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and thus is an act within that owner's "privity or knowledge." The Limitation Act is therefore inapplicable to suits for the recovery of wreck removal expenses even if the court of appeals' construction of the Rivers and Harbors Act is incorrect.

[6] Certainly the costs of wreck removal under the Rivers and Harbors Act should not be shifted from the negligent party to the innocent owner of the sunken vessel. In *Wyandotte Transportation Co.* v. *United States*, *supra*, 389 U.S. at 197 n. 6, the Court indicated that the action for wreck removal expenses is based on the negligence of the party causing the vessel to sink, "which is specifically declared not to be lawful by [the first clause of Section 15]." *Wyandotte* does not establish that wreck removal expenses should be borne by the innocent owner of the vessel sunk by others' negligence. See *In re Scranton Industries, Inc.*, 358 F. Supp. 7, 8 (S.D. N.Y.).

U.S. at 205, the government must be entitled to obtain full reimbursement of wreck removal expenses from the responsible party. The alternative, as the court of appeals observed, would be to subject maritime commerce to delays "inherent in [the] injunctive process" (Pet. App. 37)—a result that Congress clearly did not intend. Accord, *Hines, Inc.* v. *United States*, 551 F.2d 717, 727 (C.A. 6).

Application of the Limitation Act to actions to recover wreck removal costs would frustrate the enforcement objectives of the Rivers and Harbors Act. As the facts of this case reveal (Pet. App. 17), the value of vessels seized for violation of Section 15 will often be less than the costs incurred by the government in removing the wreck. The Limitation Act should not be understood to confer a civil immunity in such a case to a shipowner whose negligent conduct was a criminal act under Section 16 of the Rivers and Harbors Act. *Hines, Inc.* v. *United States, supra*, 551 F.2d at 726. This is especially so because the legislative history of the Limitation Act indicates that Congress never intended that Act to limit shipowner's liability for wreck removal expenses (Pet. App. 43-45).[7] To the extent that any conflict in purpose may

[7] The purpose of the Limitation Act was to place our law on shipowners' liability on "the same footing as that of Great Britain." 23 Cong. Globe, 31st Cong., 2d Sess. 714 (1851) (Senator Davis). The law of Great Britain in 1851, while recognizing a limited liability for shipowners, did not extend that limitation to suits against shipowners for the recovery of wreck removal expenses (Pet. App. 44-45).

exist between the two Acts, however, the court of appeals correctly ruled that the more specific and more recent legislation must control (*id.* at 47). As the Sixth Circuit held in *Hines, Inc.* v. *United States, supra*, 551 F.2d at 725, the remedies afforded the government under the Rivers and Harbors Act are not subject to the provisions of the Limitation Act because

> [a]s a general rule of law[,] when the purposes of two statutes appear to be in conflict with each other, and there is no statutory language which makes any cross-reference, and, as here, the legislative history is silent as to the possible conflict, it is generally assumed that the later statute constitutes an amendment of the earlier one. *United States* v. *Ohio Valley Company, Inc.*, 510 F.2d 1184, 1189 (C.A. 7); 2 A. Sutherland, Statutory Construction §§ 51.02, 51.05 (C. Sands 4th ed. 1973).

b. Petitioners assert (Pet. 4) that the decision of the court of appeals has "effectively destroyed the Limitation of Liability Act * * *." This hyperbolic claim overlooks the rationale—and the necessary limitations—of the decision here. The suit deals only with wreck removal costs, and the court of appeals held only that the Limitation Act does not apply in a suit by the United States to recover wreck removal expenses. Petitioners' suit under Section 4 of the Limitation Act, 46 U.S.C. 185, to limit their liability for all other claims resulting from the Galveston channel collision is unaffected by the decision in this case.

2. Petitioners contend (Pet. 9-10) that the district court and the court of appeals erred in allowing the United States to proceed not only against petitioners *in personam* but also against the vessel *in rem* to recover wreck removal expenses. This claim was not raised or considered in either of the courts below, and it is therefore not properly presented to the Court at this time. *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7; *Duignan* v. *United States*, 274 U.S. 195, 200.[8]

In any event, petitioners' claim is insubstantial. They consented to *in personam* proceedings by filing this suit on their own behalf. The possibility of supplemental *in rem* proceedings—which are authorized by Section 16 of the Rivers and Harbors Act, 33 U.S.C. 412—does not affect the amount of liability but simply offers to the government an additional means of securing payment of sums found to be due.

[8] This case was before the court of appeals on a certified interlocutory appeal under 28 U.S.C. 1292(b). The certification (Pet. App. 54) presented only the question whether the Limitation Act reduced petitioners' liability for wreck removal costs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

JUNE 1978.

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